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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DANIEL CORONEL WILSON, Defendant and Appellant.	F074819 (Super. Ct. No. F16901969) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Charles M. Bonneau III, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Daniel Coronel Wilson (defendant) guilty of aggravated assault. The offense was deemed a hate crime, which increased his prison sentence by two years. He appeals from the judgment of conviction.

Defendant challenges the sentencing enhancement on the basis of insufficient evidence. He further alleges evidentiary error in connection with a video of the underlying incident. There are also claims of prosecutorial misconduct and ineffective assistance of counsel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The victim in this case was born in Pakistan and lived most of his life in the Punjab region of India. He immigrated to the United States to live with his adult daughter. The victim's religious affiliation is Sikh, which is reflected in his appearance; he wears a turban, has a long beard, and dresses in traditional Sikh attire. He was approximately 68 years old at the time of the offense.

On December 26, 2015, shortly before 7:00 a.m., the victim was attacked in a residential area while waiting for a ride to work. Two people pulled up in a car, exited, and punched him several times. After returning to their vehicle, they struck the victim while driving away. He was hospitalized with multiple injuries.

Police received a tip regarding the involvement of defendant (age 22) and a 17-year-old accomplice, A.M. Both were arrested, but A.M. died shortly after being named in a felony complaint. Defendant was charged with assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)),[1] which was alleged to be a hate crime under section 422.75, subdivision (b). The case went to trial in October 2016.

Prosecution Case

Testifying through a Punjabi interpreter, the victim recounted the basic facts. He described being attacked by two unknown males: "They stopped their vehicle. And they came from their vehicle. And they started beating me.… [¶] … [¶] They didn't stop. They kept hitting me, beating me. After that I was unable to figure it out or acknowledge anything. And then after, I got hit with a vehicle." The jury was shown photographs of his injuries.

[1] All undesignated statutory references are to the Penal Code.

Additional details were provided by A.M.'s cousin, H.M., who testified about a telephone call he received on the morning in question. His cousin had called him at approximately 7:12 a.m. and confessed to striking an "elderly man" with his vehicle, i.e., a black Dodge Challenger. Defendant, who participated in the call via "speaker phone," confirmed his own involvement and used the words "ISIS" and "terrorist" while referencing the victim.

The jury was shown a compilation of video footage, which police had retrieved from a commercial establishment and multiple residential security cameras. Some the videos were of poor quality, but one definitely showed a person being struck by a dark-colored automobile. Defendant's claim on appeal relates to a barely discernable video of the initial attack, which is further discussed in the body of the opinion.

In addition to H.M.'s testimony, defendant was connected to the crime through cell phone evidence and a recorded jail call between him and his mother. An FBI agent who specialized in the retrieval and analysis of cell phone data testified to evidence placing defendant and A.M. near the crime scene during the relevant time period. The subsequent movement of their phones suggested they had been travelling in a vehicle. In the jail call, defendant can be heard saying "yeah" in response to his mother's comment about him not being the driver.

Defense Case

The defense called two witnesses, a brother and sister, who claimed to have seen an altercation involving three individuals at approximately the same time and location as the subject incident. The young woman had initially told police she "did not see the disturbance." At trial, she testified to having witnessed "a little confrontation" between "two males and one woman." The men had been "fighting," and "the woman was trying to stop it." When shown a photograph of the victim on cross-examination, she said, "I didn't see any of them wear a turban. So … that guy doesn't really look familiar from what I saw."

The 12-year-old brother also claimed to have seen an altercation involving two men and a woman. Unlike his sister, he testified one of the men had been wearing a turban. He described the latter individual as looking "young." When shown a photograph of the victim, he said the victim was not one of the people he had seen.

Verdict and Sentencing

The jury returned a guilty verdict and found the hate crime allegation to be true. The trial court imposed a four-year prison sentence composed of the lower terms for the crime and the enhancement. Defendant filed a timely notice of appeal.

DISCUSSION

I. Sufficiency of the Evidence

Section 422.75, subdivision (b) mandates a sentencing enhancement of two, three, or four years in state prison for "voluntarily act[ing] in concert with another person, either personally or by aiding and abetting another person," in the commission of a "hate crime." A hate crime is a felony committed because of "actual or perceived characteristics of the victim," including the victim's race, ethnicity, or religion. (§ 422.55, subd. (a)(4), (5).) Defendant claims the People failed to prove he assaulted the victim because of the victim's actual or perceived religious beliefs.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) Findings on enhancement allegations are reviewed under the same standard. (See *People v. Stanley* (1995) 10 Cal.4th 764, 792–793.)

Defendant's argument is inherently flawed insofar as he contends "no evidence supported the claim that [the victim's] perceived Sikh faith was a substantial causal factor in the crime." By citing the prosecutor's description of the victim as an "elderly Sikh man" during the questioning of H.M., defendant impliedly purports to misunderstand the People's theory of the case. He then asserts it was the victim's "general appearance—not his religion—[that] led [defendant] to believe he was a terrorist, which in turn led to the assault."

The victim noted his assailants did not try to steal his money or valuables. According to H.M., defendant admitted to pointing the victim out to A.M. and using the words "ISIS" and "terrorist." In response, A.M. asked what they should do, and defendant said something to the effect of, "[L]et's go get him."

"ISIS" is an acronym for the Islamic State of Iraq and Syria, also known as the Islamic State of Iraq and the Levant (ISIL) or simply the Islamic State. (*United States v. Muhtorov* (D.Colo. 2018) 329 F.Supp.3d 1289, 1307 & fn. 18.) While the average citizen may not know what the letters mean, it is common knowledge that ISIS is a Muslim extremist group. Viewed in the light most favorable to the judgment, the evidence allowed the jury to infer defendant assaulted the victim because of a perceived religious affiliation with Islam. Therefore, substantial evidence supports the enhancement finding.

II. Admissibility of Lay Opinion

A. Background

People's trial exhibits Nos. 31 and 32 (exhibits 31 & 32) contain the same video footage. The evidence apparently depicts the initial assault, but the image resolution is so low that it is extremely difficult to make out what is happening. Exhibit 31, which consists of one minute and 46 seconds of unaltered video, has little probative value because the subjects are too far away to be seen. Exhibit 32 is an enhanced version of

Exhibit 31. The footage was digitally magnified and "annotated" by an audio/visual technician at the district attorney's office named Kong Vang.

Defendant's opening brief accurately describes the contents of exhibit 32:

> "At around 12 seconds, the video zooms in and red text appears: 'Two people exit car, from passenger side then driver's side.' Arrows appear at around 16 seconds. At around 30 seconds, the image zooms in and displays the words: 'Attack on victim,' followed by a large oval being placed at the lower right-hand area of the image. Pixilated figures then appear to move. At 48 seconds, the text reads: 'Then two people run back and get into the car. First on driver's side … then on passenger's side.' Arrows and ovals are again inserted, and then the video ends."

Defendant's trial counsel did not object to the annotations until after the jury had seen a portion of the video. Following a sidebar conference, the objection was overruled. However, the jury was given an admonishment:

> "[Kong Vang] previously testified that he annotated the videos with arrows and with some words. And those themselves are not evidence. They are merely assistance provided to the factfinder, that's you. But it's up to you to decide what the video actually depicts beyond the actual animation in the video, again, that Mr. Vang stated that he added in when he prepared the videos."

Later, the trial court indicated the timing of the defense objection had not affected its ruling.

On appeal, defendant argues the annotations constituted irrelevant, and therefore inadmissible, lay opinion. Accounting for the possibility of forfeiture, he further alleges ineffective assistance of counsel. Avoiding the question of error, the People argue the evidence was not prejudicial.

B. Analysis

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. (*People v. Powell* (2018) 5 Cal.5th 921, 951.) However, "[n]o evidence is admissible except relevant evidence" (Evid. Code, § 350), i.e., evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (*id.*, § 210). Defendant argues Vang's annotations lacked

relevance because they were based on his subjective opinions, and "no evidence suggested he was better equipped or able to observe the content of the video than the jurors themselves."

It is easiest to dispose of this claim for lack of prejudice. "When evidence is erroneously admitted, we do not reverse a conviction unless it is reasonably probable that a result more favorable to the defendant would have occurred absent the error." (*People v. Powell*, *supra*, 5 Cal.5th at p. 951, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant's argument for review under the standard of *Chapman v. California* (1967) 386 U.S. 18 is undeveloped and without merit.[2]

In the first of three prejudice arguments, defendant states, "Vang's testimony that an 'attack' had occurred suggested his opinion that a violent, potentially injurious altercation had occurred. Such an opinion impermissibly aided the prosecution." We are not persuaded.

The word "attack" means "to set upon or work against forcefully[;] to assail with unfriendly or bitter words[;] [or] to begin to affect or to act on injuriously." (Merriam-Webster's Collegiate Dict. (11th ed. 2011) p. 79.) The victim testified to being "attacked." Defense counsel, in her opening statement, told the jury, "[The victim] was attacked that morning of December 26th. That's not the issue here. The issue is the identity of the people who attacked him." The occurrence of an "attack" was undisputed, and defendant fails to demonstrate the possibility of a more favorable outcome but for the inclusion of that word in exhibit 32.

Next, defendant complains "Vang's opinion that the passenger was the first to arrive and the last to leave also helped the prosecutor prove [defendant] aided and abetted the initial assault." He reasons "Vang's opinion suggested that [defendant] was the main

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[2]Defendant references *In re Winship* (1970) 397 U.S. 358 and *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 without providing pinpoint citations. Neither case appears helpful to his position.

attacker …, i.e., the person first to arrive, and last to leave was more deeply involved in the attack, at least to the point of aiding and abetting."

The jury found defendant was a principal participant in both "a physical altercation upon [the victim]" and "in a vehicle striking [the victim]." The testimony of H.M. portrayed defendant as the instigator of the assault. Based on the victim's statements to police, he was punched in the face at least six to eight times during the initial attack. At trial, the victim testified, "I feel one person kept hitting me. The other person brought the car. And I got a hit from the car…. [¶] … [¶] [O]ne person kept hitting me. The other person brought the car and hit me." Defendant's concern about the jury perceiving him as the "the first to arrive and the last to leave" seems misguided because a contrary conclusion would indicate he was the driver, and there was overwhelming proof of the driver's culpability for the vehicular assault.

Finally, defendant argues the trial court's admonishment "essentially characterized the annotations as demonstrative [evidence]," which "signaled to the jury that there was some evidence that supported the annotations, even though the annotations were not themselves evidence." He continues: "Suggesting that evidence supported the annotations prejudiced [defendant], and in no way cured the prejudice." The reasoning of these arguments is elusive. The jury was told, "[I]t's up to you to decide what the video actually depicts," and defendant fails to explain how or why a more favorable verdict might have been rendered if the annotations had been removed from exhibit 32. For the reasons discussed, we conclude the alleged error was harmless.

III. Alleged Prosecutorial Misconduct

Defendant's prosecutorial misconduct claim is based on a supposed attempt to elicit testimonial hearsay in violation of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). His argument is rather complicated. We will first attempt to explain defendant's theory, and then we will explain why the claim fails.

A. Background

The prosecutor's opening statement included these remarks: "[The police] got a tip that broke the case. The—not tip, excuse me. They got information that they received that broke the case. And that information was that both [defendant] and [A.M.] were bragging about attacking and hitting this old man."

During the defense opening, defendant's attorney said,

> "There's nothing about [defendant] bragging about what happened. What you are going to hear from is a friend of his[,] [N.R.,] that the prosecution is calling. And [N.R.] describes [defendant]'s, um, attitude quite differently. … And when [defendant] is asked, I think specifically by [N.R.], he says he did not want to talk about it. There was no bragging here. [¶] The two people that the DA discussed that will testify I think today are [N.R.] and [H.M.]. You are going to have to question the credibility of what they are saying."

Counsel went on to insinuate N.R. had informed on defendant to collect a $12,000 reward.

When N.R. testified as a prosecution witness, he was not asked about any communications with police. His brief testimony indicated defendant and A.M. had attended a gathering at his home the night before the incident and left together in A.M.'s Dodge Challenger sometime after midnight. Defense counsel cross-examined him about the amount of alcohol they had consumed that evening.

During the subsequent examination of a police detective, the prosecutor asked, "[A]t some point in time did you receive some information that there was some individuals making admissions of involvement or boasting about attacking an elderly Sikh man?" Defense counsel said, "I'm going to object," and the prosecutor said, "It will be offered not for the truth of the matter asserted." Following a sidebar conference, the objection was sustained and the jury was reminded "that the attorneys' questions are not evidence."

The prosecutor rephrased his question: "In the course of your investigation did you receive information that caused you and your fellow detectives and officers to now

look at [A.M.] and [defendant] as possible suspects?" The witness replied, "Yes, sir, I did." Next, the trial court explained, "So, folks, I'm letting that come in. When we say 'not for the truth of the matter asserted'—so the only reason that evidence is coming in is to allow you to understand why this witness took the actions that he took based upon that information. He received information. He took action. But the evidence has not come in to establish that the information he received itself was true."

Later, outside the presence of jurors, defense counsel unsuccessfully moved for a mistrial. We quote counsel's arguments to explain the defense theory:

> "[T]his idea that the informant—or the tipster was told about this boasting and bragging. I think that goes to content of what was said. And it violates *Crawford*. [Defendant] has a right to cross-examine his accuser. The accuser, obviously, is not the officer in this case. But by asking that question [the prosecutor] has made the accuser that person who called the officer. And I think it, even inaccurately, um, states what was—what the tipster told the officer.… [¶] There's nothing in the search warrant affidavit where this tipster is using this phrase about boasting and bragging. What the tipster says is that he talked to other mutual friends. … Um, and it says that one of these mutual friends told the tipster that [defendant] and [A.M.] beat up some guy wearing a turban and hit the man with [A.M.]'s car. This idea of the bragging and boasting comes specifically from in this case [N.R.] who testified where the prosecutor didn't ask any questions about that. [¶] … [¶] … And now with my objection the jury is going to get the impression that there is this information and that defense is withholding it."

B. Analysis

"A prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct 'that does not render a criminal trial fundamentally unfair' violates California law 'only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" (*People v. Harrison* (2005) 35 Cal.4th 208, 242.)

Defendant argues the prosecutor committed misconduct by "telling the jurors they would hear evidence that [he] and [A.M.] were heard bragging about attacking [the victim]; not producing said testimony from any witness who claimed to have heard the bragging, and; attempting to circumvent the Sixth Amendment to United States Constitution, and the rule against hearsay, through improper questioning. The prosecutor's questioning effectively sought to introduce inadmissible testimony that someone had heard [defendant] boast or brag about attacking [the victim]."

The People note the prosecutor never alleged N.R. was the tipster whose information led to defendant's arrest. That accusation was made by defense counsel, but counsel did not attempt to substantiate it at trial. Defendant argues "it would have been absurd for the defense to put [N.R.] on the stand to testify in the first instance that [defendant] had been bragging, just so they could then attempt to impeach him on it." The argument is not persuasive considering the defense raised the issue in the first place. The prosecutor was certainly under no obligation to pursue a potentially disadvantageous line of questioning during the People's case-in-chief.

Defendant's claim is ultimately based on the prohibition against intentionally eliciting inadmissible testimony. (*People v. Chatman* (2006) 38 Cal.4th 344, 379–380; *People v. Smithey* (1999) 20 Cal.4th 936, 960.) Such misconduct allegedly occurred when the detective was asked, "[D]id you receive some information that there was some individuals making admissions of involvement or boasting about attacking an elderly Sikh man?" We are not convinced there was a deliberate attempt to elicit testimonial hearsay. First, the prosecutor's response to the defense objection identified a valid nonhearsay purpose for the question, i.e., to establish the effect on the listener. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162; *People v. Davis* (2005) 36 Cal.4th 510, 535.) "[T]he confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted'—that is, for nonhearsay purposes." (*People v. Hopson* (2017) 3 Cal.5th 424, 432.) Second, the prosecution's star

witness, H.M., had already testified to defendant's "admissions of involvement." Since the jury previously received direct evidence of the admissions, there was no tactical need to present the same information via hearsay testimony. Third, considering "the prosecutor acquiesced by agreeing to rephrase his question, … these brief and fleeting references were not so intemperate, egregious, or reprehensible as to constitute prosecutorial misconduct under state law or federal constitutional law." (*People v. Mills* (2010) 48 Cal.4th 158, 199.)

Furthermore, the crux of defendant's prejudice argument is he was unfairly portrayed as "the type of person to boast about violently attacking an elderly man." However, the statements made during the phone call between himself, A.M., and H.M., which occurred just minutes after the attack, could fairly be interpreted as boastful. Defendant fails to acknowledge it was the phone call to H.M., not the alleged information from a tipster, upon which the prosecutor relied when he made these statements during closing argument: "We all know in the course of that conversation, they are bragging about what happened and what they had just done to an elderly Sikh man; the only elderly Sikh man on this day in question that was run over in the City of Fresno. And they are bragging about that."

In summary, the merits of defendant's claim are doubtful as to the issue of misconduct. Were he able to establish error, we would affirm for lack of prejudice. The conduct in question was brief and isolated. (Cf. *People v. Dement* (2011) 53 Cal.4th 1, 40 [witness's "comment that defendant had bragged about killing his brother" was improper but not "'incurably prejudicial'"].) Moreover, the purported hearsay "was largely duplicative of evidence the jury properly received." (*Ibid*.) The People's case hinged on H.M.'s testimony, which is presumably why the jury asked to have it reread during deliberations. There is no reason to believe the verdict might have been different if not for the prosecutor's suggestion defendant had admitted his involvement to more than one individual.

IV. Cumulative Prejudice

Defendant argues the cumulative effect of inadmissible lay opinion and prosecutorial misconduct requires reversal. There are no close issues of prejudice in this case. Therefore, we reject the claim of cumulative prejudice. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 825.)

V. Alleged Ineffective Assistance of Counsel

The jury was instructed on simple assault as a lesser included offense of the charged crime. Simple assault is a misdemeanor, and the hate crime enhancement only applies to felonies. (§§ 241, subd. (a), 422.75, subd. (b).) The prosecutor thus made the following statements during closing argument:

> "You are required by law to consider lessers. There is no lesser involved in this case. This case is the greater crime which is the assault by means likely to produce great bodily injury. The lesser is so less that you can't even make a finding on the hate crime enhancement.
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> "The hate crime only applies to the greater crime which is assault by means likely to produce great bodily injury which is why we're exactly here. So this hate crime, as you know, is what happened. [The victim] was judged by his appearance and his appearance alone. And it was for that reason that he was attacked. And the words were 'Isis, terrorist, let's go get him.'"

Defendant argues the quoted language constituted prosecutorial misconduct. In his words, "This was misconduct because it lowered the prosecutor's burden of proof by suggesting the jury should find [defendant] guilty of felony assault, even without proof beyond a reasonable doubt." Because no objection was made below, defendant alleges ineffective assistance of counsel.

"A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel. The appellate record, however, rarely shows that the failure to object was the result of counsel's incompetence." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) To prevail on his claim, defendant must show "(1)

counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice." (*People v. Centeno* (2014) 60 Cal.4th 659, 674.)

"When attacking the prosecutor's remarks to the jury, the defendant must show … there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*People v. Centeno, supra*, 60 Cal.4th at p. 667.) Defendant's interpretation of the prosecutor's remarks is self-serving to the point of irrationality. His claim fails because a competent defense attorney could have reasonably concluded the statements did not warrant an objection or admonition. (See *People v. Price* (1991) 1 Cal.4th 324, 387 ["Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile"]; *People v. Bradley* (2012) 208 Cal.App.4th 64, 90 ["Failure to raise a meritless objection is not ineffective assistance of counsel"].)

DISPOSITION

The judgment is affirmed.

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PEÑA, J.

WE CONCUR:

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LEVY, Acting P.J.

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FRANSON, J.